No. 00-864

In the Supreme Court of the United States

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, BERNADETTE BERNABEI, ANNETTE FOSTER-HALL, *et al.*,
Petitioners,

v.

AMERITECH BENEFIT PLAN COMMITTEE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS

T. Michael Payne
Senior Vice President and General Counsel
Ameritech Corporation
225 West Randolph
Suite 2700
Chicago, Illinois 60606

James D. Holzhauer
Counsel of Record
Robert A. Bloom
Jeffrey W. Sarles
Jeri A. Lindahl-Garcia
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

QUESTION PRESENTED

Does Title VII, the Equal Pay Act, or ERISA require that employers and benefit plans re-calculate the service credit of employees who took pregnancy-related leaves of absence prior to the effective date of the Pregnancy Discrimination Act of 1978 when they determine eligibility for current benefit programs?

RULE 29.6 STATEMENT

Respondents include the following corporate entities:

Ameritech Corporation, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, Wisconsin Bell, Inc., Ameritech Services, Inc., Ameritech Advanced Data Services of Illinois, Inc., Ameritech Advanced Data Services of Indiana, Inc., Ameritech Advanced Data Services of Michigan, Inc., Ameritech Advanced Data Services of Ohio, Inc., Ameritech Advanced Data Services of Wisconsin, Inc., Ameritech Mobile Communications, Inc., Ameritech Information Systems, Inc., Ameritech Credit Corporation, Ameritech Development Corporation, Ameritech International, Inc., Ameritech Publishing, Inc., Ameritech Interactive Media Services, Inc., Ameritech New Zealand Limited, Ameritech Health Connections, Inc., Ameritech Long Distance Industry Services, Inc., Ameritech Communications, Inc., New Media Enterprises, Inc., and Ameritech Telecommunications Services Company.

Each of the Respondents is ultimately owned by SBC Communications, Inc., a publicly held company. For each Respondent that is a corporation, the following lists its parent corporation, if any, and stockholders which are publicly held companies owning 10% or more of the stock in the Respondent:

Corporate Respondent*	**Parent Corporation(s)**	**Publicly Held Stockholder(s)**
Ameritech Corporation	SBC Communications, Inc.	SBC Communications, Inc.

Corporate Respondent*	**Parent Corporation(s)**	**Publicly Held Stockholder(s)**
Illinois Bell Telephone Company	Ameritech Corporation	None
Indiana Bell Telephone Company, Inc.	Ameritech Corporation	None
Michigan Bell Telephone Company	Ameritech Corporation	None
The Ohio Bell Telephone Company	Ameritech Corporation	None
Wisconsin Bell, Inc.	Ameritech Corporation	None
Ameritech Services, Inc.	Illinois Bell Telephone Co.	None
	Indiana Bell Telephone Co., Inc.	None
	Michigan Bell Telephone Co.	None
	The Ohio Bell Telephone Co.	None
	Wisconsin Bell, Inc.	None

Corporate Respondent*	**Parent Corporation(s)**	**Publicly Held Stockholder(s)**
Ameritech Advanced Data Services of Illinois, Inc.	Ameritech Corporation	None
Ameritech Advanced Data Services of Indiana, Inc.	Ameritech Corporation	None
Ameritech Advanced Data Services of Michigan, Inc.	Ameritech Corporation	None
Ameritech Advanced Data Services of Ohio, Inc.	Ameritech Corporation	None
Ameritech Advanced Data Services of Wisconsin, Inc.	Ameritech Corporation	None
Ameritech Mobile Communications, Inc.	Ameritech Corporation	None
Ameritech Information Systems, Inc.	Ameritech Corporation	None

Corporate Respondent*	**Parent Corporation(s)**	**Publicly Held Stockholder(s)**
Ameritech Credit Corporation	Ameritech Corporation	None
Ameritech Development Corporation	Ameritech Corporation	None
Ameritech International, Inc.	Ameritech Corporation	None
Ameritech Publishing, Inc.	Ameritech Corporation	None
Ameritech Interactive Media Services, Inc.	Ameritech Publishing, Inc.	None
Ameritech New Zealand Limited	Ameritech Corporation	None
Ameritech Health Connections, Inc.	Ameritech Information Systems, Inc.	None
Ameritech Denmark, Inc.	Ameritech International, Inc.	None
Ameritech Communications, Inc.	Ameritech Corporation	None
Ameritech New Media, Inc.	Ameritech Corporation	None

Corporate Respondent*	**Parent Corporation(s)**	**Publicly Held Stockholder(s)**
Ameritech Telecommunications Services Company	Ameritech Corporation	None

*All of the Respondents listed existed at the time this lawsuit was filed. Although several have gone out of existence following the merger of Ameritech Corporation and SBC Communications, Inc., in the interest of completeness we continue to list them all.

TABLE OF CONTENTS

Page

STATEMENT 1

ARGUMENT 8

CONCLUSION 16

TABLE OF AUTHORITIES

Cases: Page

AT&T Corp. v. *EEOC*, 99 Civ. 1444 (TFH) (D.D.C. July 13, 2000), appeal docketed, No. 00-5280 (D.C. Cir. Aug. 4, 2000) 13
Bazemore v. *Friday*, 478 U.S. 385 (1986) .. 4, 5, 6, 9
Bell Atlantic Cash Balance Plan v. *EEOC*, 976 F. Supp. 376 (E.D. Va. 1997), aff'd, 182 F.3d 906 (4th Cir. 1999) 12
Carter v. *AT&T*, 870 F. Supp. 1438 (S.D. Ohio 1994) vacated by consent, 1996 U.S. Dist. LEXIS 21836, 1996 WL 656571 (S.D. Ohio Sept. 13, 1996) 5, 10
Dasgupta v. *University of Wisconsin Board of Regents*, 121 F.3d 1138 (7th Cir. 1997) .. 5
Delaware State College v. *Ricks*, 449 U.S. 250 (1980) 5
EEOC v. *Ameritech Services, Inc.*, No. 97 CV 2106 (N.D. Ohio) 12
EEOC v. *Bell Atlantic Corp.*, 1999 U.S. Dist. LEXIS 8813, 1999 WL 386725 (S.D.N.Y. 1999) 10, 12, 14
Flaum v. *Board of Educ.*, 450 F. Supp. 191 (S.D.N.Y. 1978) 14
James v. *Delta Airlines, Inc.*, 571 F.2d 1376 (5th Cir. 1978) 14
Lorance v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989) 9
Masco v. *United Air Lines, Inc.*, 574 F.2d 1127 (3rd Cir. 1978) 14
Pallas v. *Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991) 4, 5, 9, 12, 14, 15

Redding v. *AT&T Corp.*, 1997 WL 537882
(10th Cir. 1997) 10, 13
Shaw v. *Delta Air Lines, Inc.*,
463 U.S. 85 (1983) 7
Teamsters v. *United States*,
431 U.S. 324 (1977) 5, 7
Thompson v. *Board of Educ.*,
526 F. Supp. 1035 (W.D. Mich. 1981) ... 14
United Air Lines, Inc. v. *Evans*,
431 U.S. 553 (1977) 5, 6, 9
Whitehead v. *Oklahoma Gas & Elec. Co.*,
187 F.3d 1184 (10th Cir. 1999) 13

Miscellaneous Authorities:

E.E.O.C. COMPLIANCE MANUAL, No. 915.003
(Oct. 3, 2000) 11, 12, 14, 15
H.R. Rep. No. 95-948, at 6 (1978) 14
S. Rep. No. 95-331, at 6 (1977) 14

STATEMENT

This case presents an issue of great importance to employers, pension plan administrators, employees and plan participants throughout the United States: whether employers and pension plans must re-calculate the seniority of female employees who took pregnancy-related leaves prior to the effective date of the Pregnancy Discrimination Act of 1978 ("PDA") and who did not receive seniority credit for those leaves under circumstances in which seniority credit would have been required after the PDA became effective. As petitioners point out, the issue presented affects tens of thousands of female employees in the telecommunications industry and an untold number of employees and employers in other industries. The square conflict between the Seventh Circuit and the Ninth Circuit on identical facts, the E.E.O.C.'s administrative guidelines rejecting the Seventh Circuit's decision and its continuing enforcement proceedings against employers that administer their pension plans in accordance with the Seventh Circuit's decision, the ongoing efforts of federal courts to decide the same issue, and the critical importance of the issue for employers, pension plans, and the many women involved, all call for this Court's review. Accordingly, even though Ameritech is confident that the Seventh Circuit's decision is correct, we do not oppose review of the court of appeals' decision by this Court.

1. For most of the time prior to the 1979 effective date of the PDA, Ameritech[1/] treated maternity or pregnancy leaves

---

[1/] Ameritech Corporation did not come into existence until 1984 (five years after the effective date of the PDA) as part of the AT&T divestiture. Although many of the events relevant to this case involved Ameritech's predecessors and occurred before Ameritech was created, we will follow the convention of the courts below and the petitioners and (unless the context

as personal leaves, which entitled employees to a maximum of 30 days credit under the company's seniority system (referred to as the "Net Credited Service" or "NCS" system). Pet. App. 3a.[2/] Employees (male or female) who took disability leaves during the same time period received full NCS seniority credit. *Ibid.* As of the effective date of the PDA, Ameritech modified its policies to comply with the statute, but it did not go back and re-calculate the seniority of employees who took leaves prior to the PDA-mandated amendments. Seniority calculated under the NCS system continued to govern eligibility for retirement under the Ameritech pension plans, including early retirement programs put into effect by plan amendments in 1991, 1992 and 1994. *Id.* at 3a-4a, 22a-23a. Accordingly, some employees who took pregnancy or maternity leaves prior to the effective date of the PDA, and who did not receive full seniority credit for those leaves, found that they were not eligible to receive the early retirement benefits that they would have been eligible for had they received full NCS seniority credit for those leaves. *Id.* at 4a.

Petitioners Cheryl Cuprys and Bernadette Bernabei both challenged the denial of their claim for benefits under the 1994 early retirement program. Pet. App. 4a. After their claims

---

dictates otherwise) use "Ameritech" to refer to Ameritech Corporation, the other respondents (all affiliates of Ameritech), and their predecessors. Pet. App. 1a, 22a; Pet. 3 n.1.

[2/] The NCS system involves adjustment of an employee's hire date to account for absences that are not entitled to seniority credit. For example, if an employee hired on January 1, 1970, took a nine-month maternity leave in 1972 and was entitled to only one month's seniority credit, her hire date would be adjusted by eight months (to September 1, 1970) in order to "squeeze out" the portion of her leave for which she was not entitled to seniority credit. Pet. App. 22a.

were denied by the Ameritech Benefit Plan Committee, they each filed charges of discrimination with the E.E.O.C., which issued right to sue letters. *Ibid.* On December 20, 1995, Bernabei filed suit in the United States District Court for the Northern District of Ohio, claiming that Ameritech's application of its NCS seniority system to her claim for early retirement benefits violated Title VII, the Equal Pay Act, ERISA and state law. *Ibid.* While that case was pending, on March 3, 1997, Ameritech filed suit in the Northern District of Illinois seeking a declaratory judgment that it had not violated any of those laws. *Id.* at 4a-5a. Named as defendants were 36 present and former Ameritech employees as representatives of a class, the Communications Workers of America, AFL-CIO ("CWA"), and the International Brotherhood of Electrical Workers, Local Nos. 165, 188, 336, 383 and 399 ("IBEW"). *Id.* at 4a-5a, 20a-21a. In May of 1997, the district court in Ohio transferred the *Bernabei* case to Illinois and it was consolidated with Ameritech's lawsuit. *Id.* at 5a. The Unions and the 36 named defendants were joined by over 900 individual women who intervened in the action, including Ms. Cuprys. *Id.* at 10a & n.1, 42a-55a; Pet. 7.

2. On July 20, 1998, the district court granted Ameritech's motion for summary judgment and denied petitioners' cross-motion. Pet. App. 20a-39a. Turning first to the Title VII claim, the court described the different perspectives of the parties:

> Ameritech characterizes the harm resulting from its reliance on net credited service dates as the *effect* of discrete acts taken before 1979: its predecessors' refusal to grant more than 30 days service credit for pregnancy and maternity leaves and the corresponding adjustments to employees' net credited service dates upon their return to work. The employees characterize the harm resulting from Ameritech's

> current reliance on net credited service dates as a fresh act of discrimination; in other words, each time Ameritech bases employment decisions on net credited service dates – without re-calculating net credited service to remedy the effects of its predecessors' pre-1979 leave policies – it makes a fresh decision to exclude pre-1979 pregnancy leave and affirmatively adopts a facially discriminatory policy.

Id. at 26a. The controlling legal issue was whether petitioners' claims were timely. *Ibid.* Petitioners argued that their claims were timely under three theories: (1) the calculation of net credited service is facially discriminatory and thus may be challenged at any time; (2) the NCS system was adopted for discriminatory purposes and may be challenged at any time; and (3) the reliance on NCS seniority constitutes a "continuing violation." *Id.* at 27a.

The district court held that the calculation of net credited service was not facially discriminatory, expressly rejecting the Ninth Circuit's decision in *Pallas* v. *Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991). Pet. App. 27a-30a. "To the extent *Pallas* concludes that reliance on net credited service dates without re-calculating pre-1979 net credited service based on post-1979 law is a facially discriminatory policy, this court finds *Pallas* unpersuasive and respectfully declines to follow it." *Id.* at 30a. The court also rejected petitioners' argument that *Bazemore* v. *Friday*, 478 U.S. 385 (1986), required a holding that Ameritech's practices were facially discriminatory: "*Bazemore* does not stand for the proposition that a facially neutral policy becomes facially discriminatory if the policy perpetuates discriminatory effects." *Id.* at 29a.

The district court then turned to and rejected petitioners' claim that Ameritech adopted the NCS system for a

discriminatory purpose because it knew that the NCS dates of employees who took pregnancy-related leaves prior to the effective date of the PDA did not provide full seniority credit for those leaves. Again the court declined to compel Ameritech to follow *Pallas*: "Nor are the issues presented by this lawsuit so straightforward that Ameritech was bound to accept *Pallas* (a 2-1 decision of the Ninth Circuit) or *Carter* [v. *AT&T*, 870 F. Supp. 1438 (S.D. Ohio 1994)] (a vacated memorandum opinion) as the definitive statement on the legality of net credited service dates that reflect pre-PDA policies. The fact that Ameritech continued to rely on net credited service dates after *Pallas* and *Carter* were decided is simply not evidence that Ameritech's decision was based on discriminatory animus." Pet. App. 31a-32a.

The district court held that *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), precluded petitioners' "continuing violation" claim. Pet. App. 32a-38a. "Admittedly, this case presents close and difficult questions about the scope of the 'continuing violation' doctrine in employment discrimination law. But the court is persuaded this case is more like *Evans*, *Teamsters* [v. *United States*, 431 U.S. 324 (1977)], [*Delaware State College* v.] *Ricks*, [449 U.S. 250 (1980)] and *Dasgupta* [v. *University of Wisconsin Board of Regents*, 121 F.3d 1138 (7th Cir. 1997)] than *Bazemore* and its progeny." Pet. App. 34a.

The court also granted Ameritech's summary judgment motion on the Equal Pay Act, ERISA and state law claims. Pet. App. 38a-39a. The court held that Ameritech's *bona fide* seniority system provided a "complete defense" to the Equal Pay Act claim. *Id.* at 38a. After questioning whether a claimant could "bootstrap" a sex discrimination claim into a breach of fiduciary duty claim under ERISA, the court held that reliance on a neutral seniority system does not breach a plan administrator's fiduciary duties even if it gives effect to pre-PDA policies. *Ibid.* Finally, the court held that the state law

claims "mirror" the Title VII and Equal Pay Act claims and were unsuccessful for the same reasons. *Id.* at 39a.

3. The court of appeals affirmed the district court's judgment. Pet. App. 1a-19a. The court first addressed a belated jurisdictional and ripeness challenge by the E.E.O.C., holding that the district court clearly had jurisdiction over Ameritech's declaratory judgment action. *Id.* at 5a-8a. Any jurisdictional doubt was completely put to rest by petitioners' counterclaims and by the consolidated *Bernabei* suit. *Id.* at 6a. The E.E.O.C.'s ripeness argument – based on a claimed failure to exhaust administrative remedies – also failed in light of the *Bernabei* lawsuit and the Cuprys intervention. Both Ms. Bernabei and Ms. Cuprys had filed discrimination charges with the E.E.O.C. and had received right to sue letters. *Id.* at 7a. Under the circumstances, there could be no doubt as to jurisdiction or ripeness. *Id.* at 7a-8a.[3/]

On the merits, the Seventh Circuit first addressed the Title VII claim. Pet. App. 11a-16a. The court of appeals characterized the case as turning on whether *Bazemore* (relied upon by petitioners) or *Evans* (relied upon by Ameritech) provides the "better fit." *Id.* at 12a. The court "acknowledge[d] that the line between continuing violations that arise with each new use of the discriminatory act (*e.g.*, the *Bazemore* paychecks) and past violations with present effects (*e.g.*, the *Evans* seniority) is subtle at best." *Id.* at 14a. The court found significant the fact that this case, like *Evans*, involved seniority.

[3/] On its own initiative the court of appeals questioned the propriety of certifying the case as a class action under Fed. R. Civ. P. 23(b)(1) and 23(b)(2). The court did not decertify the class, but limited the effect of its decision to the named parties and intervenors. Pet. App. 10a. Petitioners have not raised the class issue in this Court, and Ameritech is not cross-petitioning the Court to review that issue.

Title VII itself affords special deference to the operation of *bona fide* seniority systems "as long as the differences are not the result of an intention to discriminate." *Ibid.* Three factors influenced the court's holding that there was no such intent to discriminate: (1) the Supreme Court's holdings prior to the PDA that Title VII did not prohibit discrimination based upon pregnancy; (2) the non-retroactive treatment of the PDA in the courts; and (3) this Court's *Teamsters* decision holding that the perpetuation of pre-Act discrimination does not preclude a seniority plan from being *bona fide* within the meaning of Title VII. *Id.* at 15a. The employees affected by Ameritech's pre-PDA policies knew at the time they returned to work that they did not receive full seniority credit for their leaves and that the reduced credit would have an impact on benefits; "[t]he time for bringing a complaint was therefore long ago, and the district court correctly recognized that these employees had sued too late." *Id.* at 16a.

The court of appeals found that Ameritech had met its burden of demonstrating that the *bona fide* seniority system affirmative defense defeated petitioners' Equal Pay Act claims, which were also untimely. Pet. App. 16a-17a.

As to the ERISA claims, the Seventh Circuit held that "Ameritech's decision to use NCS to calculate time of employment cannot evidence an intent to discriminate if the NCS system itself has passed muster under the antidiscrimination laws." Pet. App. 18a. In addition, ERISA itself does not prohibit discrimination in the provision of benefits. *Ibid.*; *citing Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983). Although it is not clear whether discrimination against plan participants could ever constitute a breach of fiduciary duty under ERISA, "this is not such a case." Pet. App. at 18a-19a. Plan fiduciaries cannot "cater to the optimal needs of each individual beneficiary," but are instead required to act as "a reasonably prudent business person with the

interests of all the beneficiaries at heart." *Id.* at 19a. Ameritech's adherence to the NCS system for all participants met that standard. *Ibid.*

4. The court of appeals denied Ameritech's petition for rehearing and rehearing *en banc* on August 31, 2000,[4/] and petitioners timely filed their petition for certiorari on November 28, 2000. Pet. App. 40a-41a.

ARGUMENT

There can be no question that there is a conflict among the circuits on the important issues presented by this case and that, absent resolution of the conflict, the lower federal courts will continue to struggle over which line of circuit authority to follow. Moreover, the E.E.O.C. – the federal agency charged with administering Title VII – interprets the statute completely contrary to what the court of appeals and the district court held in this case, and continues enforcement action against employers on that basis. In fact, respondent Ameritech, having prevailed in this lawsuit in Illinois, is nonetheless the defendant in a lawsuit brought by the E.E.O.C. in Ohio based on the very same Title VII and Equal Pay Act theories rejected by the Seventh Circuit in this case. Unless the legal issues are resolved, employers will be subject to such lawsuits whenever they initiate early retirement or other special pension enhancement programs on the theory that each new application of pre-PDA seniority is a new violation of Title VII, ERISA and the Equal Pay Act. The need to clarify the law is so great that even though Ameritech prevailed in the Seventh Circuit, it

---

[4/] Ameritech unsuccessfully sought to have the court of appeals reconsider its limitation of the decision to the named parties and intervenors, to the exclusion of absent class members. Pet App. 8a-11a.

does not oppose review of the court of appeals' decision by this Court.

1. In *Pallas* v. *Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), the employer (like Ameritech) was a telecommunications company that came into existence upon the divestiture of AT&T in 1984. Again like Ameritech, it inherited the Net Credited Service seniority system, which reflected the same limitations on seniority credit for pregnancy-related leaves taken prior to the PDA. Ms. Pallas attempted to take advantage of an early retirement program instituted in 1987, but was told that she had a few days too little service credit to be eligible for early retirement. She filed suit, claiming that by not giving her full NCS service credit for pregnancy leaves she had taken prior to 1979, Pacific Bell had violated Title VII and ERISA. The district court dismissed Pallas's Title VII claim, relying on *Evans* and *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), but the Ninth Circuit reversed, holding that the "controlling Supreme Court precedent" was *Bazemore*, not *Evans*. 940 F.2d at 1327. The Ninth Circuit also held that Pallas had stated a claim under ERISA. *Ibid.* One member of the panel (Judge Dumbauld) dissented on the Title VII issue, but agreed with the majority on the ERISA claim. *Id.* at 1327-1329.

The Seventh Circuit reached the exact opposite result on indistinguishable facts in the present case. The issue again was whether the employer violated Title VII and ERISA (and also the Equal Pay Act) when its failure to give full NCS seniority credit for pre-PDA pregnancy left employees ineligible for benefits under new early retirement or pension enhancement initiatives. The Seventh Circuit also looked to *Bazemore* and *Evans* for guidance, but concluded that *Evans* controlled and that Ameritech had not violated Title VII. Pet. App. 11a-16a. Again contrary to the Ninth Circuit, the Seventh Circuit held

that Ameritech had not violated ERISA. *Id.* at 17a-19a.[5/] It is hard to imagine a more direct conflict.

2. Unless the conflict is resolved by this Court, other federal courts will struggle with the conflicting circuit authority. Already, in *EEOC* v. *Bell Atlantic Corp.*, 1999 U.S. Dist. LEXIS 8813, 1999 WL 386725 (S.D.N.Y. 1999), the district court considered the issue after the Illinois district court issued its *Ameritech* opinion. The court declined to follow the district court's holding in this case, noting that "the Ninth Circuit and a district court in Ohio [*Carter* v. *AT&T Co.*, 870 F. Supp. 1438 (S.D. Ohio 1994), vacated by consent, 1996 U.S. Dist. LEXIS 21836, 1996 WL 656571 (S.D. Ohio Sept. 13, 1996)] have held, on similar facts, that discrimination claims based upon the adoption of early retirement plans were not untimely." 1999 U.S. Dist. LEXIS 8813, at *12, 1999 WL 386725, at 4. The district court concluded that the *Ameritech* case had been "wrongly decided." 1999 U.S. Dist. LEXIS 8813, at *13, 1999 WL 386725, at 4.

3. The E.E.O.C.'s administrative guidelines and its persistent enforcement efforts further prove that the issue

---

[5/] In *Redding* v. *AT&T Corp.*, 1997 WL 537882 (10th Cir. 1997), the court held that, absent plan language creating an entitlement to retroactive service credit, ERISA itself does not provide a cause of action for plan participants complaining of denial of service credit for pre-ERISA (*i.e.*, pre-1975) pregnancy-related leaves. "Ms. Redding's general reference to discretionary authority, unsupported by any references to plan provisions that would support her entitlement to the subject benefits, constitutes a conclusion that is insufficient to state a claim." *Id.* at *4. Like the employees in this case and *Pallas*, Redding claimed that the 1995 denial of her claim for an adjustment of benefits was a current violation of ERISA, but the court of appeals affirmed the dismissal of her suit.

presented in this case (and thus the difficulty caused by the circuit conflict) is not going to go away on its own. The E.E.O.C. COMPLIANCE MANUAL includes the following discussion:

> Employers must allow women who are on pregnancy-related leaves to accrue seniority in the same way as those who are on leave for reasons unrelated to pregnancy. * * *
>
> These principles also apply to pregnancy-related leaves taken before the effective date of the PDA, where an employer uses years of service to establish eligibility for retirement benefits.
>
> EXAMPLE - CP took maternity leave in 1975, before passage of the PDA. At the time, her employer's policy denied any accrual of service credit during maternity leaves, although it permitted employees on leave for other medical reasons to accrue service credit during their leaves. Although the employer changed its policy in 1979 to conform to the PDA and to treat maternity leave similarly to other medical leaves, it never gave CP credit for her pre-PDA leave.
>
> In 1996, CP's employer implements an incentive program that authorizes employees with 25 or more years of service to take early retirement with full pensions. Because she took a maternity leave for which she accrued no years of service credit, CP falls short of the 25 year service requirement and files a charge challenging discrimination on the basis of pregnancy.

> CP's claim is timely and states a violation of the PDA. In evaluating eligibility for early retirement in 1996, the employer has distinguished between employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities. While the denial of service credit to women on maternity leave was not unlawful when CP took her leave in 1975, the employer's decision to incorporate that denial of service credit in calculating seniority in 1996 is discriminatory.

E.E.O.C. COMPLIANCE MANUAL, No. 915.003 (Oct. 3, 2000). In a footnote to this passage, the E.E.O.C. manual cites *Pallas* with approval, and includes a "but see" citation to the Seventh Circuit's decision in this case. "The Commission disagrees with the court's analysis in *Ameritech* and believes that the *Pallas* decision states the correct application of the law." *Id.* at n.96.

True to its administrative guidelines, the E.E.O.C. is continuing its lawsuit against Ameritech in Ohio, making the identical Title VII and Equal Pay Act claims the Seventh Circuit rejected in this case. *EEOC* v. *Ameritech Services, Inc.*, No. 97 CV 2106 (N.D. Ohio). In addition to *EEOC* v. *Bell Atlantic* in the Southern District of New York, *supra*, judging from "preemptive strikes" filed against the E.E.O.C. in Virginia and the District of Columbia, the Commission apparently is also pursuing enforcement actions against the Bell Atlantic Cash Balance Plan and AT&T. *See Bell Atlantic Cash Balance Plan* v. *EEOC*, 976 F. Supp. 376, 378 (E.D. Va. 1997) (employer and pension plan filed declaratory judgment action after the E.E.O.C. issued a reasonable cause determination "finding that Bell Atlantic's application of the 'facially neutral service system has a disparate impact on * * * females who took pregnancy leave prior to 1979'"), aff'd, 182 F.3d 906 (4th

Cir. 1999); *AT&T Corp.* v. *EEOC*, 99 Civ. 1444 (TFH) (D.D.C. July 13, 2000), appeal docketed, No. 00-5280 (D.C. Cir. Aug. 4, 2000). If the Seventh Circuit's decision is correct – and we certainly believe that it is – these companies, thousands of employees and participants, and the government will be subjected to years of litigation, expense and uncertainty for no reason.

4. This case cannot be disregarded as a short-lived problem or as something affecting only a small and discrete group of companies (former AT&T affiliates) and their employees. Female employees who took pregnancy leaves in the late 1970s may now be only in their early forties, and may very well continue in the workforce for another twenty-five years or more.[6] Whenever their employers initiate limited-time early retirement or pension enhancement programs it is likely that some of the women will not meet the service requirements and will be able to claim that they would have met those requirements had they been given full service credit for their pregnancy leaves.

Although the litigation to date has focused primarily on AT&T and its former subsidiaries and affiliates,[7] that does not lessen the need for this Court's review. To begin with, AT&T

---

[6] The plaintiff in *Redding* v. *AT&T Corp.* began working for an AT&T subsidiary in 1942, and retired in 1989. The Tenth Circuit's opinion does not indicate when she took the first of her twelve pregnancy-related leaves, but it seems a safe assumption that she did so 40 or even 50 years or more before she filed her lawsuit in 1996.

[7] *But see Whitehead* v. *Oklahoma Gas & Elec. Co.*, 187 F.3d 1184, 1192 (10th Cir. 1999) (unsuccessful PDA claim by employee terminated as a result of pregnancy in 1969 and later rehired with no "bridging" of service credit).

and the companies that arose from AT&T following divestiture have an enormous impact on the economy, and employ hundreds of thousands of workers. Companies like Ameritech and its parent, SBC Communications, Inc., operate in several states and in several federal circuits.[8/] In addition, although AT&T and its former affiliates may have the dubious honor of being the first targets of this litigation, when Congress enacted the PDA, it considered policies limiting service credit for pregnancy-related leaves to be a problem generally. *See* S. Rep. No. 95-331, at 6 (1977); H.R. Rep. No. 95-948, at 6 (1978). Such policies were apparently common in industries that employed a large number of women, including education and airlines. *See, e.g., James* v. *Delta Airlines, Inc.*, 571 F.2d 1376 (5th Cir. 1978); *Masco* v. *United Air Lines, Inc.*, 574 F.2d 1127 (3d Cir. 1978); *Thompson* v. *Board of Educ.*, 526 F. Supp. 1035 (W.D. Mich. 1981); *Flaum* v. *Board of Educ.*, 450 F. Supp. 191 (S.D.N.Y. 1978). If the E.E.O.C. and the Ninth Circuit are correct, employers in these and other industries will certainly also be the subject of future enforcement proceedings and litigation.

In addition, the approach to Title VII, ERISA and the Equal Pay Act reflected in *Pallas*, *Bell Atlantic Corp.*, and the E.E.O.C.'s complaints and administrative materials is not readily limited to pregnancy leaves. The E.E.O.C. COMPLIANCE MANUAL acknowledges that the pregnancy leave policies at issue in these cases was lawful prior to the effective

---

[8/] Ironically, Ameritech and Pacific Bell, the employer involved in *Pallas*, are now both subsidiaries of SBC Communications, Inc.; SBC subsidiaries and pension plans are thus already subject to different standards of federal law in different jurisdictions.

date of the PDA.[2/] If the Ninth Circuit's and the E.E.O.C.'s analysis is correct, it would also apply to other policies that were lawful before the effective date of Title VII, or before the effective date of other statutes amending Title VII, and it would also apply to other antidiscrimination laws, including the Age Discrimination in Employment Act and the Americans With Disabilities Act. For example, if *Pallas* and the E.E.O.C. are correct, would not someone claiming to have been denied a job because of race, sex or religious discrimination before Title VII became effective in 1965 have a claim for additional service credit to qualify for post-Title VII retirement programs?

5. The legal issues presented by this case are not complicated and do not vary depending on the facts of each case. There is a plain disagreement between the Seventh Circuit and the Ninth Circuit, and between employers and benefit plan administrators on the one hand, and the E.E.O.C., several unions, employees and plan participants on the other hand, concerning the application of Title VII, ERISA and the Equal Pay Act to a common set of facts. In these circumstances, the Court's consideration would not benefit from further litigation in the courts of appeals.

[2/] "While the denial of service credit to women on maternity leave was not unlawful when CP took her leave in 1979 * * *." E.E.O.C. COMPLIANCE MANUAL, No. 915.003 (Oct. 3, 2000).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

T. Michael Payne
Senior Vice President and General Counsel
Ameritech Corporation
225 West Randolph
Suite 2700
Chicago, Illinois 60606

James D. Holzhauer
Counsel of Record
Robert A. Bloom
Jeffrey W. Sarles
Jeri A. Lindahl-Garcia
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

DECEMBER 2000